INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
The merging banks	3
The merger	6
The trial and the district court's decision	9
Introduction and summary of argument	16
Argument	19
I. Approval of the Comptroller of the Currency did not immunize this bank merger from the operation of the antitrust laws	19
II. Commercial banking in Fayette County, Kentucky, and trust department services in that county are each relevant markets within which to appraise the anti-competitive effects of this merger	20
A. Commercial banking is a relevant product market	20
B. Trust department services are another relevant product market	22
C. Fayette County is the relevant geographical market	25
III. The merger constitutes a combination in unreasonable restraint of trade in commercial banking in Fayette County, in violation of Section 1 of the Sherman Act	28

718-235—64——1

Argument—Continued
III. The merger constitutes—Continued
A. The merger's anti-competitive effects meet the standards prescribed by this Court's decisions respecting horizontal mergers challenged under the Sherman Act ..... Page 28
1. The railroad merger cases 29
2. The *Columbia Steel* decision 34
(a) Dollar volume 36
(b) Percentage of business controlled 36
(c) Strength of remaining competition 36
(d) Business necessity or predatory purpose 37
(e) Probable development of industry 37
(f) Consumer demands 38
(g) Other factors 38
B. The merger would clearly violate Section 7 of the Clayton Act, and this circumstance should be given substantial weight in deciding whether it also violates Section 1 of the Sherman Act 39
1. The relation between Section 1 of the Sherman Act and Section 7 of the Clayton Act 40
2. The anti-competitive consequences of this merger compared with those in *Philadelphia National Bank* 47

Argument—Continued
IV. The merger constitutes a combination to monopolize corporate trust services in Fayette County, in violation of Section 2 of the Sherman Act ..... Page 53
Conclusion 56
Appendix 57

CITATIONS

Cases:

American Tobacco Co. v. *United States*, 328 U.S. 781 ..... 54, 55
Appalachian Coals, Inc. v. *United States*, 288 U.S. 344 41
Brown Shoe Co. v. *United States*, 370 U.S. 294 ..... 24, 40, 45
Federal Trade Commission v. *Motion Picture Advertising Co.*, 344 U.S. 392 ..... 41, 44, 45
International Boxing Club v. *United States*, 358 U.S. 242 25
International Shoe Co. v. *Federal Trade Commission*, 280 U.S. 291 32
Johnson v. *United States*, 163 Fed. 30 44
Northern Pacific Ry. Co. v. *United States*, 356 U.S. 1 ..... 41, 42, 44
Northern Securities Co. v. *United States*, 193 U.S. 197 ..... 28, 29, 30, 31
Standard Oil Co. v. *United States*, 221 U.S. 1 30
Standard Oil Co. v. *United States*, 337 U.S. 293 45
Times-Picayune Publishing Co. v. *United States*, 345 U.S. 594 ..... 40, 42, 44
United States v. *Aluminum Co. of America*, 91 F. Supp. 333 22
United States v. *Aluminum Co. of America*, 148 F. 2d 416 ..... 54, 55

Cases—Continued

United States v. *Columbia Steel Co.*, 334 U.S. 495 ..... Page 18, 28, 29, 34, 35, 39, 42, 43, 46
United States v. *Griffith*, 334 U.S. 100 ..... 54, 55
United States v. *Hutcheson*, 312 U.S. 219 43
United States v. *Lehigh Valley Railroad Co.*, 254 U.S. 255 31
United States v. *Paramount Pictures*, 334 U.S. 131 ..... 25, 55
United States v. *Philadelphia National Bank*, 374 U.S. 321 ..... 13, 16, 17, 18, 19, 20, 22, 25, 28, 39, 40, 41, 47, 48, 49, 50, 51, 52
United States v. *Reading Co.*, 253 U.S. 26 ..... 28, 31, 33
United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 55
United States v. *Southern Pacific Co.*, 259 U.S. 214 ..... 28, 31
United States v. *Trenton Potteries Co.*, 273 U.S. 392 43
United States v. *Union Pacific R.R. Co.*, 226 U.S. 61 ..... 22, 28, 30, 31
United States v. *Yellow Cab Co.*, 332 U.S. 218 54

Statutes:

Bank Merger Act of 1960, 74 Stat. 129, 12 U.S.C. (Supp. IV) 1828(c) 7, 19, 33
Clayton Act, 38 Stat. 730, as amended:
Sec. 3 ..... 42, 44, 45, 46
Sec. 7 (38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. 18) 16, 17, 18, 19, 20, 28, 40, 41, 42, 43, 45, 46, 47
Federal Trade Commission Act, Sec. 5 45

Statutes—Continued

Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1 *et seq.*: Page
Sec. 1 ..... 2, 14, 16, 17, 28, 29, 33, 35, 36, 39, 41, 42, 43, 44, 54, 55
Sec. 2 ..... 2, 14, 16, 17, 19, 20, 54, 55
73 Stat. 460, 12 U.S.C. (Supp. III) 215(a) ... 7
Ky. Rev. Stat:
Sec. 287.180 25
Sec. 287, 220 24
Sec. 288.530 21

Miscellaneous:
Amer. Law Inst., Restatement of Tarifs, § 285 43
Berle, *Banking under the Anti-Trust Laws*, 49 Col. L. Rev. 589 33
H. Rep. No. 1416, 86th Cong., 2d Sess 33
Handler, *A Study of the Construction and Enforcement of the Federal Antitrust Laws*, TNEC Monograph No. 38, Senate Committee Print, 76th Cong., 3d Sess 30
S. Rep. 196, 86th Cong., 1st Sess 33
U.S. Dept. of Commerce, Bureau of the Census, *County and City Data Books* (1962), App. A, Table A-1 3

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 36

UNITED STATES OF AMERICA, APPELLANT

v.

FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY AND FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (R. 1244) is reported at 208 F. Supp. 457.

JURISDICTION

The judgment of the district court was entered on July 30, 1962 (R. 1251) and the notice of appeal was filed by the United States on September 14, 1962 (R. 1252–1253). This Court noted probable jurisdiction on June 17, 1963 (R. 1254; 374 U.S. 824).

The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. 29.

QUESTIONS PRESENTED

1. Whether the consolidation of the First National Bank and Trust Company of Lexington, Kentucky with the Security Trust Company of Lexington is a combination in unreasonable restraint of commercial banking in Fayette County, Kentucky, in violation of Section 1 of the Sherman Act.

2. Whether the consolidation is a combination to monopolize corporate trust services in that area, in violation of Section 2 of the Sherman Act.

STATUTE INVOLVED

The Sherman Antitrust Act, 26 Stat. 209, as amended, 15 U.S.C. 1, 2, provides in pertinent part:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. * * *
>
> SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. * * *

STATEMENT

This is a civil action in which the United States charged that the consolidation of First National Bank and Trust Company of Lexington, Kentucky ("First National") and Security Trust Company of Lexington ("Security Trust") to form First Security National Bank and Trust Company ("First Security")

constituted a combination in unreasonable restraint of trade and commerce in violation of Section 1 of the Sherman Act and a combination and an attempt to monopolize trade and commerce in violation of Section 2 of the Sherman Act. The complaint was filed on March 1, 1961, the date on which the merger was consummated (R. 1, 83).[1] On March 6, 1961, after proceedings held upon the government's application for a preliminary injunction, the district court entered an order requiring appellees to maintain separate books and records for each of the merging banks during the pendency of the suit. After trial, on July 27, 1962, the court dismissed the government's complaint. The order that books and records be separately maintained continues to be observed by the appellees.

THE MERGING BANKS

Fayette County, Kentucky is, in many ways, a typical medium-sized community. Its population in 1960 was 131,900 (DX 96, R. 1235), of which 62,800 reside within the city limits of Lexington, its only incorporated municipality (DX 96, R. 1235; PX 107, R. 871).[2] In downtown Lexington the head offices of

[1] "PX" refers to the government's exhibits; "DX" refers to defendants' exhibits; "PRA" refers to Plaintiff's Request for Admission of Facts and defendants' response thereto; and "R" refers to the Transcript of Record. In the appendix, *infra*, p. 57, we cite the places in the record at which each exhibit was admitted in evidence.

[2] The 1960 census showed 130 cities in the United States with population in excess of 100,000; 180 with population between 50,000 and 100,000; and 366 between 25,000 and 50,000. U.S. Dept. of Commerce, Bureau of the Census, *County and City Data Book* (1962), App. A, Table A-1, pp. 578–580.

all the commercial banks in the county are located "within sight and a few feet of each other" (PX 129, R. 951). Because the nearest city of any size (Louisville, Kentucky) is some 60 miles away, and because there are no banks of substantial size any closer, the competition faced by the county banks is virtually limited to that generated among themselves. Local businessmen can look only to the Lexington banks—which numbered six prior to this merger—for satisfaction of their credit needs (PX 107, R. 874; R. 191, 263, 298–299).

First National, the oldest and largest Lexington bank (PX 109, R. 878), was more than twice the size of the second largest bank, more than three times the size of each of the next two largest banks, more than four times the size of the fifth largest bank, and about five times the size of the remaining bank (PX 5, R. 728). It accounted for approximately 40 percent of the total assets, deposits and loans in all commercial banks in the county (PX 5–7, R. 728–729). At the end of 1960, it had $58,673,000 in deposits and $35,434,000 in loans (PX 6–7, R. 729).

First National's history was one of impressive growth, achieved in part by mergers. Between 1865, the year of its organization, and 1929, it was involved in twelve different take-overs, mergers and consolidations (PX 109, R. 878–879). In the fifteen years immediately preceding the year of the subject merger, its total assets had risen from $45,503,000 to $65,069,000 (DX 30, R. 1045). Between 1956 and 1960, its annual net profits had risen from $293,000 to $552,000 (PX 9, R. 730). Although First National did not

enter the trust business actively until about 1940 (R. 328), by the time of the merger it had become Security Trust's most successful competitor in this field (PX 35, R. 786). The rapid development of First National's trust business was attributable in large part to its commanding position in the commercial field (R. 378–379).

Security Trust was organized in 1886* (PX 109, R. 879) to engage in the trust business, and did not enter the commercial banking field until 1947. Formed "by the businessmen of Lexington, including a good many officers and Directors of other banks for the purpose of * * * rendering good corporate fiduciary services to the community" (R. 327), it was for many years the only corporate fiduciary in the county (PX 92, R. 843–844). At the time of the merger all but one of the Lexington banks were competing in this field, but Security Trust continued to attract the largest share of trust business (PX 35, R. 786; R. 327–329; PX 92, R. 844). At the end of 1960, Security Trust held over 50 percent of the total value of trust assets in the county (PX 35, R. 786).

Security Trust's prominence in the trust field materially assisted the rapid growth of its commercial business (R. 329, 377–379). In 1945, its total loans were $852,000; in 1947 it obtained authority to make unsecured loans, and it entered the commercial bank-

*Its original name, Security Trust and Safety Vault Company, was subsequently shortened to Security Trust Company (R. 327).

ing field (R. 327, 338). By 1960, its total loans amounted to $12,317,000 (DX 31, R. 1046). During the years from 1945 to 1960, its deposits rose from $6,840,000 to $17,402,000 (DX 22, R. 1035–1036). At the time of the merger, Security Trust was the fourth largest bank in Fayette County, with approximately 13 percent of the total assets, deposits and loans (PX 5–7, R. 728–729) and had the largest lending limit (*i.e.*, the amount which can lawfully be loaned to a single customer) of any bank in the county (DX 14, R. 1027). It operated one branch office and had applications pending for two more (PX 107, R. 871–872; PX 129, R. 952). These new offices, each about one mile from a First National office (*ibid.*), would have given Security Trust as many offices as any bank in the county (PX 63, R. 806).

THE MERGER

Merger talks between First National and Security Trust, which had proved unsuccessful in 1957, were resumed in early 1960 (R. 348, 357). These talks resulted in a plan of consolidation,[4] approved by

[4] The plan submitted to the Comptroller, and later executed, provided for consolidation of First National and Security Trust under the charter of First National (PX 25, Sec. 1, R. 765). Sixty percent (or 120,000 shares) of the 200,000 shares of common stock of First Security, the consolidated bank, were allocated to First National shareholders and 40 percent (or 80,000 shares) were allocated to Security Trust shareholders (*id.*, Sec. 4, Sec. 6, R. 766, 768). One share of First National stock was exchanged for 1.2 shares of First Security stock, and one share of Security Trust stock was exchanged for 2 shares of First Security stock. In addition, a cash payment of $.80 was paid the holder of each First National share exchanged for First Security shares (PX 25, Sec. 6, R. 768).

directors of both banks, which, on December 1, 1960, was submitted to the Comptroller of the Currency[5] (PX 21–22, R. 753–758; PX 129, R. 936).

Pursuant to the provisions of the Bank Merger Act of 1960, 74 Stat. 129, 12 U.S.C. (Supp. IV) 1828(c), the Comptroller of the Currency requested and received reports on the probable competitive effects of the proposed consolidation from the Attorney General, the Federal Deposit Insurance Corporation and the Board of Governors of the Federal Reserve System. Each report concluded that the merger would adversely affect competition among commercial banks in Fayette County (PX 107, R. 870–875; PX 109, R. 877–883; PX 110, R. 883–891).

The Attorney General's report concluded that "the proposed consolidation will eliminate essential and substantial competition between two major banks in the Lexington area, and will tend toward, if not create, monopoly power for First National [First Security] which may have the effect of eliminating further competition" in Fayette County (PX 110, R. 884).

The Report by the Board of Governors of the Federal Reserve System noted that the merged banks would control, through their combined trust department, the two Lexington newspapers, an estimated 40 to 60 percent of the real estate in the primary downtown shopping area, and 56 of the 300 nearby farms, a total of 16,299 acres of farmland (PX 107, R. 875). The report also indicated that directors of First Na-

[5] See 73 Stat. 460, 12 U.S.C. (Supp. III) 215(a).

tional either owned or controlled one of three local radio stations and one of the two Lexington television stations (*ibid.*). It concluded that (*ibid.*):

> The proposed consolidation would result in the elimination of the fourth largest of the six banks in Lexington and in a substantial lessening of competition. It would result in a substantial concentration in one institution of banking resources and fiduciary business in Lexington and Fayette County.

The report of the Federal Deposit Insurance Corporation noted that the consolidated bank's deposit and loan volumes would exceed those of the four remaining Lexington banks combined; that the lending limit of an individual borrower at the combined bank would be $190,000 less than the sum of his present lending limits at the two merging banks;[4] and that, prior to any consolidation, First National's lending base was the largest of all Lexington banks while Security Trust's was "equal to any of the other four banks" (PX 109, R. 883). Concentration of trust business would also result from the consolidation, the FDIC report found, "but to a much higher degree"; the combined bank "would hold about 95% of all trust assets in Lexington banks" (*ibid.*). The report concluded that "the effect of the proposal on competition appears to be adverse" and cited the opinion of an FDIC Supervising Examiner that

[4] Prior to merger, First National's lending limit as a national bank was $250,000, and Security Trust's lending limit under state law was $440,000. The lending limit of the consolidated national bank is $500,000 (PX 109, R. 880; DX 14–15, R. 1027–1028).

the consolidation "would be a tendency toward monopoly" (*ibid.*).

The Comptroller of the Currency approved the consolidation on February 27, 1961 (PX 26, R. 778). While he issued no opinion at that time, he explained the basis for approval in his Annual Report (DX 93, R. 1224–1227). The Comptroller acknowledged the "excellent" financial history and financial condition of the consolidating banks, their "records of long and successful operation" and their "high standing in the community." He found their capital stock to be adequate and their future earnings prospects "excellent." He concluded, however, that the "convenience and needs of the community would be served better by the combined institutions than by their operation as separate entities."

With the approval of the Comptroller, First National and Security Trust consolidated on March 1, 1961 (Defendants' Answer, R. 83). The complaint in this action, seeking an injunction permanently restraining the defendant banks from carrying out the consolidation, was filed the same day (R. 1).

THE TRIAL AND THE DISTRICT COURT'S DECISION

The evidence. The case was tried from February 19 to February 27, 1962. The government relied principally upon uncontested statistical and documentary evidence and the testimony of presidents of three of the four remaining banks located in Fayette County.

The relative size of First National and its five competitors prior to the consolidation appears from the

following chart, which is derived from government exhibits containing uncontested statistical evidence:[1]

	Assets	Deposits	Loans
First National	39.83%	40.06%	40.22%
Citizens Union	17.06	16.78	16.41
Bank of Commerce	12.90	13.32	14.46
Security Trust	12.87	11.88	13.98
Central Bank	9.14	9.66	8.85
Second National	8.10	8.30	6.09

The government's statistics demonstrated that by adding Security Trust's market shares to those of First National, the merger created a bank larger than all remaining banks combined. In assets and deposits, First Security is over three times as large as the second largest county bank and over six times as large as the smallest one; in loans, it is over three times as large as the second largest bank and over eight times as large as the smallest one (PX 5–7, R. 728–729). In tabular form the new banking structure was as follows (PX 5–7, R. 728–729):

	Assets	Deposits	Loans
First Security	52.70	51.95	54.20
Citizens Union	17.06	16.78	16.41
Bank of Commerce	12.90	13.32	14.46
Central Bank	9.14	9.66	8.85
Second National	8.10	8.30	6.09

In trust department business, the statistics showed that Security Trust and First National were close competitors, holding 94.82 percent of all trust assets between them, and accounting for 92.20 percent of all trust department earnings and 79.62 percent of all trust accounts (PX 35, R. 786). The other three

[1] See PX 5–7, R. 728–729. The relative size also appears in a graph included by the merging banks in their application to the Comptroller. See PX 129, R. 962.

banks were very small factors in this field, as the following table indicates (PX 35, R. 786):

	Trust Assets	Trust Dept. Earnings	Number of Trust Accounts
Security Trust	*50.55%*	*46.91%*	*54.31%*
First National	*44.27*	*45.29*	*25.31*
Citizens Union	3.41	4.21	16.01
Second National	1.33	.63	2.12
Bank of Commerce	.44	2.96	2.26

The presidents of three of the four[8] remaining competitor banks testified that the consolidation would seriously affect their long-range ability to compete effectively (R. 199–201, 268–269, 301–303). They testified that First Security would obtain business just because it would be the biggest bank in town, and that the "image" of bigness is a powerful attraction to customers, particularly those who are newcomers to the community (R. 293, 303), and "treasurers of national corporations" (R. 201). This advantage increases progressively with the disparity in size (*ibid.*). In the trust field, the virtual monopoly of First Security would foreclose all potential competitors because "it would be very conclusive to a prospective client to say we have got 94 percent of the business in this town; we must be the best" (R. 229). These sales points, together with the multiplicity of extra services which could be provided

[8] Although neither side called any witness from the only other bank in Fayette County, a representative of that bank, along with officials of the three other banks, opposed the proposed consolidation in visits to the offices of the Comptroller of the Currency, the Federal Reserve Board, the Federal Deposit Insurance Corporation and the Department of Justice (PX 109, R. 880; PX 110, R. 884).

with its combined resources, could be fully exploited by the county's largest bank with the aid of its substantial advertising budget (R. 199–201, 203, 217–218, 239–240, 268, 302–303, 430; see PX 126, R. 941–942).

The interrelationship of trust business with other aspects of the commercial banking business, such that each contributes to the growth of the other, was developed at length and without contradiction. A bank develops trust business from its commercial customers and commercial business from its trust department clients and tenants (R. 194–195, 265–266, 378, 591–592). This reciprocating effect is largely responsible for the rapid growth of Security Trust in the commercial field, since its entry in 1947, and of First National in the trust field, since its entry in about 1940 (R. 230, 327–329, 337–338, 367–368, 377–379). For example, First Security's trust services with respect to real estate enable it to solicit commercial bank business from prospective tenants who are new in the community (R. 265–266).

There was also testimony that this consolidation might cause additional mergers. There had been ten banks in the county in 1929, seven in 1938, six in 1960, and after the merger there would be five (DX 38, R. 1058). No new bank has been established in the county since 1938 (*ibid.*). At least one past consolidation was directly attributable to a need to compete effectively with First National (R. 203). Presidents of three of the remaining banks testified that because the First Security merger creates a bank of such commanding size, the remaining competitors will seriously consider further mergers in order to create a bank

large enough to "compete against [First Security's] bigness" (R. 203, 268–269, 303–304).

The main thrust of the defense here, as in *United States* v. *Philadelphia National Bank*, 374 U.S. 321, was that the principles of competition and monopoly are different in banking than they are in all other industries. The defense was developed in large part through the testimony of Mr. L. A. Jennings, formerly Deputy Comptroller of the Currency and, at the time of his testimony, a vice president of a Texas bank. He gave testimony similar to that which he gave in the *Philadelphia National Bank* case (374 U.S. 321, 368, n. 45; Record, Oct. Term, 1962, No. 83, pp. 1929–2024). He also testified that while the consolidation will make First Security large enough to attract correspondent bank business and large accounts from big national corporations, it will not adversely affect the remaining banks in Lexington since they are too small to compete for either type of business (R. 616–617, 631–632).[9]

The four other defense witnesses unconnected with the merging banks who testified about competition in commercial banking[10] expressed similar opinions

[9] The same contention was made in other testimony (R. 353–355, 430, 616, 631) and in appellees' application to the Comptroller (PX 129, R. 954).

[10] Of the 15 defense witnesses unconnected with the merging banks, 7 testified only about the merged banks' prospective ability to secure correspondent bank deposits from non-local banks (Miller, Boswell, J. P. Smith, Elliston, Daniel, Routt, Forsee). Two discussed only trust business (Sinclaire, Hurley) and another discussed only the economic growth of the Lexington area (Kennedy).

(R. 407, 409, 422-423, 529-530, 585, 589, 662, 665). Defendants also contended that the decline in First National's share of commercial banking business in Fayette County from over 50 percent in 1942 to around 40 percent in 1960[11] proves that First Security's control of more than 50 percent as a result of the merger will not prevent the remaining banks from competing effectively (see, *e.g.*, R. 622).

The district court's decision.—The district court held that the consolidation of First National and Security Trust did not violate Section 1 or Section 2 of the Sherman Act (R. 1250). The court agreed with the government that the Comptroller of the Currency's approval of a consolidation under the Bank Merger Act does not render it immune from attack under the Sherman Act (R. 1246). Likewise it appears to have decided two relevant market issues favorably to the government: (1) the court presumably found commercial banking to be a relevant part of trade or commerce, *i.e.*, the "product market," since its conclusions of law relate only to the "field of commercial banking" (R. 1250); (2) the court also found Fayette County to be the "service area" of the consolidating banks (R. 1249), and limited its discussion to the commercial banks in that county (R.

[11] In 1942, First National had 53.7 percent of total deposits held by all Lexington commercial banks; in 1960, First National had 40.1 percent. During the same period, First National's share of total loans declined from 47.5 percent to 40.2 percent and its share of total assets declined from 52 percent to 39.83 percent (DX 22, R. 1035-1036; DX 26, R. 1040-1041; DX 38, R. 1058).

1248-1249), apparently accepting the government's view that Fayette County is the relevant geographical market.

The court did not discuss the government's contention that trust department services also constitute a relevant product market; its opinion treated the merged bank's large percentage of trust business in Fayette County as of no independent significance. It also found that (R. 1247):

> The financial history and condition of both banks were excellent and both had a long record of successful operation and high standing in the community. Consolidation of neither of these banks was motivated by necessity to protect their depositors or shareholders.

The court relied upon the testimony of "numerous witnesses," unconnected with the consolidating banks who were "men of long experience in the field of banking," who gave their opinion that the merger "would not lessen competition in the banking field in Fayette County" or "tend to create a monopoly in that field" (R. 1249). It discounted the testimony of the presidents of three of the four remaining local banks, "who expressed considerable fear that the consolidation would result in serious loss to the other banks and would be disastrous to some of them," observing that this testimony "seems based merely upon surmise and is lacking in factual support" (R. 1249).

Finally, the court found "[n]o predatory act or conduct on the part of the defendants," stating that the merger "clearly appears to have been the result

of a lawful program of expansion on the part of the merging banks rather than an invidious scheme to restrain competition or to secure monopoly in the local field of banking" (R. 1249). Accordingly, the district court concluded that no violation of the Sherman Act had been proved (R. 1250).

INTRODUCTION AND SUMMARY OF ARGUMENT

The government instituted this civil action to enjoin the merger between the largest and fourth largest banks in Lexington, Kentucky, in March 1961, at a time when it was uncertain whether Section 7 of the Clayton Act, as amended in 1950, extended to bank consolidations of this sort. Accordingly, the complaint did not assert that the merger violated Section 7 of the Clayton Act, but alleged instead that it effected an unreasonable restraint of trade in violation of Section 1 of the Sherman Act and that it amounted to a combination and an attempt to monopolize in violation of Section 2 of the Sherman Act. The district court concluded, after trial, that the Sherman Act had not been violated and dismissed the complaint. Since that time, this Court has definitively decided, in *United States* v. *Philadelphia National Bank*, 374 U.S. 321, that bank mergers are subject to the proscription of Section 7 of the Clayton Act, as amended. However, since the present action was tried in the district court under a complaint which alleged violations of the Sherman Act only, it squarely presents the question whether this bank merger should be invalidated under that Act (see this Court's refer-

ence to the present case in *Philadelphia National Bank*, 374 U.S. at 355). We submit that the merger violates Section 1 of the Sherman Act under controlling decisions of this Court as well as under the public policy which the 1950 amendment to the Clayton Act should be deemed to have incorporated into the standards of the Sherman Act. The merger also violates Section 2 because of its effect on the trust department services market in Fayette County.

A. Preliminarily, we note that the district court here, as did the district court and this Court in the *Philadelphia National Bank* case, rejected the claim that approval granted to the merger by the Comptroller of the Currency immunized it from the operation of the antitrust laws.

B. In determining the area of effective competition, we submit that the district court correctly selected commercial banking as the primary product market and the Fayette County area as the relevant geographical market. The district court erred, however, in not considering the effects on competition among corporate fiduciaries in Fayette County. Trust department services constitute a separate product submarket, particularly relevant for Section 2 purposes, because such services perform a distinct function in the community and have been the subject of vigorous competition among banks in the area.

C. The merger violates the standards established under Section 1 of the Sherman Act in a series of decisions in which this Court has invalidated mergers of major railroads because of the elimination of the merging companies' *inter sese* competition. In these

cases, which have never been overruled or explicitly questioned, the Court did not consider the strength of the remaining competition, and there is no need to engage in any such inquiry here.

Even if the continued validity of the railroad merger cases has been cast in doubt by this Court's decision in *United States* v. *Columbia Steel Co.*, 334 U.S. 495, the standards enunciated in the latter case have been fully met here. The present merger would combine two banks which, together, control more than 50 percent of the assets held by commercial banks in the geographical market, and would make it necessary for the merged bank's competitors to consider consolidation in order to compete effectively. In light of the increasing trend in the area towards concentration among banking concerns and the increased demand among consumers for banking services, the present merger is particularly unjustified.

D. Moreover, this Court's decision in *Philadelphia National Bank*, which concerned a merger with anti-competitive consequences far less telling than those in the present case, lends added support to our view that the merger is illegal. Although the standards for illegality under Section 7 of the Clayton Act may be less stringent than those required under Section 1 of the Sherman Act, the Clayton Act does establish a national policy which must be carried over into the more general directive of the Sherman Act. If a merger clearly violates Section 7 of the Clayton Act because it is likely substantially to lessen competition, this factor is of great significance in determining

whether it violates Section 1 of the Sherman Act as well. The consequences of the present merger are much more harmful to competition than those in the *Philadelphia National Bank* case, which was itself a "clear" violation of Section 7.

E. This merger violates Section 2 of the Sherman Act because the merged bank controls approximately 95 percent of the total assets held in trust by corporate fiduciaries in Fayette County. Consequently, the appellees' merger is a "combination to monopolize" the trust department services market in that community.

ARGUMENT

I

APPROVAL OF THE COMPTROLLER OF THE CURRENCY DID NOT IMMUNIZE THIS BANK MERGER FROM THE OPERATION OF THE ANTITRUST LAWS

In the present case, as in *United States* v. *Philadelphia National Bank*, 374 U.S. 321, the appellees contended in the district court that the approval of their merger by the Comptroller of the Currency pursuant to the Bank Merger Act of 1960, 12 U.S.C. (Supp. IV) 1828(c), immunized the transaction from the operation of the antitrust laws. The district court, relying on the explicit language of the Senate and House Reports which negated any intention to affect the application of the antitrust laws, rejected this argument. The issue was put to rest by this Court's decision in *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 350–352, which sustains the conclusion of the district court.

II

COMMERCIAL BANKING IN FAYETTE COUNTY, KENTUCKY, AND TRUST DEPARTMENT SERVICES IN THAT COUNTY ARE EACH RELEVANT MARKETS WITHIN WHICH TO APPRAISE THE ANTI-COMPETITIVE EFFECTS OF THIS MERGER

A. COMMERCIAL BANKING IS A RELEVANT PRODUCT MARKET

The district court properly found that commercial banking was one relevant product market with regard to which the effects of the merger on competition should be judged. This finding is reinforced by this Court's subsequent conclusion in *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 356–357, that commercial banking constitutes a separate "line of commerce" for purposes of Section 7 of the Clayton Act.

Fayette County banks, like commercial banks generally, are the only financial institutions in the county which are authorized to receive demand deposits and offer checking accounts (R. 187–188, 261, 658). This unique function represents a large portion of all commercial bank business; as of December 31, 1960, over 73 percent of all deposits in Fayette County banks were demand deposits (PX 28, R. 780). Commercial banks are also the only financial institutions in Fayette County which accept time deposits from partnerships and corporations (PRA 49, R. 124, 151), make single-payment loans to individuals (R. 263), and make commercial and industrial loans to businesses (R. 190–191, 262, 298).

In addition to these unique services, commercial banks provide others which are "insulated within a

broad range from substitutes furnished by other institutions." *Philadelphia National Bank, supra,* at 356. For example, while small loan companies also offer personal loans to individuals, they are restricted by state law to loans of $800 or less (Ky. Rev. Stat., § 288.530), and they charge interest rates far in excess of those charged by commercial banks (*ibid.*; PX 129, Exhibit (G), R. 969; R. 198, 301, 385–386). As a result, small loan companies attract loans with higher risks, and consequently deal with a different type of borrower (R. 198, 219, 301). Similarly, while other types of financial institutions also offer real-estate loans, the terms thereof differ substantially from real-estate loans made by commercial banks. Because the large volume of demand deposits carried by commercial banks requires maintenance of a high degree of liquidity, the real-estate loans they generally offer are of shorter duration than those offered by savings and loan associations or insurance companies (R. 190, 197–198, 262, 267, 300, 379–380).

Finally, commercial banks offer a wider array of financial services than any other financial institution (PRA 33, R. 122, 149; R. 189, 298). In addition to a variety of loans (PX 31, R. 783) and checking accounts, they offer safe deposit boxes, Christmas Clubs, correspondent bank facilities, collection services, and a wide range of trust department services (R. 186).

In sum, commercial banks provide unique services of great importance, offer others upon terms which differ substantially from those offered elsewhere, and

provide a totality of services which cannot be found in any other type of financial institution.

B. TRUST DEPARTMENT SERVICES ARE ANOTHER RELEVANT PRODUCT MARKET

The district court rejected, *sub silentio*, the government's contention that trust department services—the services provided by corporate fiduciaries—constitute a relevant product submarket in which to test the merger's effect on competition. We contend that this ruling, which seriously affected the Section 2 challenge to the merger, was erroneous.

Like commercial banking in general, the business of providing corporate trust services is, in some respects, "entirely free of effective competition" and is otherwise "insulated within a broad range from substitutes furnished by other institutions." *United States* v. *Philadelphia National Bank, supra* at 356. Only corporate fiduciaries (which, in Fayette County, are the trust departments of commercial banks) [12] are in the business of performing trust services and openly compete [13] to provide such services. They advertise in newspapers and by direct mail, sponsor

[12] In Fayette County, only commercial banks offer trust department services (R. 187, 195, 252, 265).

[13] "To compete is to strive for something which another is actively seeking and wishes to gain", *United States* v. *Union Pacific R.R. Co.*, 226 U.S. 61, 87. See also Judge Knox's definition of competition in *United States* v. *Aluminum Co. of America*, 91 F. Supp. 333, 355 (S.D.N.Y.): "the independent endeavor of two or more persons or organizations within the realm of a chosen market place, to obtain the business patronage of others by means of various appeals, including the offer of more attractive terms or superior merchandise."

finance forums, distribute information to lawyers and accountants, and actively solicit prospective clients (R. 226). Individuals make no such efforts to obtain trust business (R. 265, 371, 676). Indeed, most individuals who serve as fiduciaries do not do so on a regular basis (R. 676). As one Lexington banker put it, "I never feel like we are in direct competition with the widow of a deceased man or with the man of a deceased woman. And that is who the bulk of these [individual trustees] are" (R. 226).

Corporate fiduciaries are the only fiduciaries in Fayette County providing trust services to corporations (R. 252, 373). These important services include registering, transferring and paying dividends and interest upon corporate securities, and administering corporate retirement and pension plans (R. 194, 264–265).

Corporate fiduciaries also administer estates, *inter vivos* and testamentary trusts, and serve as committees, guardians, escrow agents, investment advisors, and farm managers (PX 129, Exhibit (H), R. 970–971; R. 194, 264, 675). While individuals in Fayette County also perform these functions (see, e.g., DX 74, R. 1100–1101), the larger trusts apparently are administered by corporate fiduciaries. In 1960, the average estate or trust to which the trust department of a commercial bank was appointed fiduciary by the Fayette County Court was valued at $63,985, while the average estate or trust assigned to individual trustees was valued at $11,430 (see DX 74, R. 1100–1101).

The very existence of Security Trust is persuasive evidence that corporate fiduciaries differ from indi-

vidual trustees in a commercially meaningful fashion. Security Trust was founded (in 1886) because of a community need for a corporate fiduciary, a need which still exists today (R. 371–372). Unlike individuals, corporate fiduciaries enjoy continuous existence and permanent capacity (R. 194–195, 265, 589, 693), are always available during business hours (R. 590), and offer auxiliary services, such as safe deposit boxes (R. 252). While an individual trustee may not be competent to deal with all the subjects important to sound trust administration, trust departments provide experienced specialists in such matters (R. 195, 265, 372, 589). Corporate fiduciaries also offer the judgment of many, as opposed to that of one (R. 195, 265, 589, 693–694), and the safety derived from supervision and periodic examination by government regulatory agencies (R. 590, 693). Their financial condition generally is more secure than that of any individual trustee (R. 693) and, perhaps because of this, Kentucky law exempts them from the obligation of posting surety bonds (Ky. Rev. Stat. § 287.220). Individual trustees, however, must file surety bonds at a cost to the trust (R. 590).

The finding that commercial banking is a relevant product market does not preclude an additional finding that trust department services, a distinguishable group of services offered by commercial banks, constitute a separate and equally appropriate market. Under the Sherman Act, as under the Clayton Act (*Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325), relevant markets may be found within broader rele-

vant markets. *International Boxing Club* v. *United States*, 358 U.S. 242, 252; *United States* v. *Paramount Pictures*, 334 U.S. 131, 172–173.

For these reasons, trust department services are "a sufficiently separate part of the trade or commgrce", *International Boxing Club* v. *United States*, 358 U.S. 242, 252, to constitute a relevant product market, and the district court's failure to so find was error.

C. FAYETTE COUNTY IS THE RELEVANT GEOGRAPHICAL MARKET

The same considerations regarding the banking industry which led this Court to conclude in the *Philadelphia National Bank* case that the relevant geographical market was the four-county Philadelphia metropolitan area, 374 U.S. at 357–362, sustain the district court's conclusion in this case that the merger should be judged in light of its effect on competition in Fayette County. The "factor of inconvenience" which "localizes banking competition as effectively as high transportation costs in other industries" (374 U.S. at 358) is fully supported by the present record.

Practically all of the business of the Lexington banks originates in Fayette County.[14] Only 4.8 percent of First National's demand deposit accounts, and only 4.5 percent of Security Trust's demand deposit accounts, were held by depositors who did not maintain offices in Lexington (PX 118, R. 910; PX 120,

[14] By state law, the merging banks, and all other banks with their principal offices in Fayette County, may not locate branch offices outside the county (Ky. Rev. Stat. § 287.180).

R. 912). In dollar volume, only 2.8 percent of First National's and Security Trust's demand deposit accounts were held by such depositors (PX 119, R. 911; PX 121, R. 913). Presidents of two other Lexington banks testified that 95 percent of their customers for deposits and loans and 95 percent of their dollar volume in deposits and loans originate in Fayette County (R. 186, 297). The president of another Lexington bank testified that over 97 percent of his customers, and over 97 percent of his dollar volume, in deposits and loans orginate in the county (R. 260).

With the exception of the large national concerns, businessmen in the area are restricted to Fayette County banks for their working capital loans (R. 191, 263, 298). One Lexington banker testified that (R. 298):

> The only place [small or medium size concerns] have to go is in Lexington because that is where they are known, and a good portion of the credit anaysis is on the individual—how well you know him, his background, his character.
>
> If a man should go to another city, my experience is that he would be referred back to the town from which he came.

Commercial banks outside Lexington do a negligible amount of business in Fayette County (PX 66–78, R. 810–832; PX 94–105, R. 848–861). Banks which maintain correspondent bank balances for Lexington banks do not compete with Lexington banks since such competition might cause withdrawal of these balances (R. 193, 264, 299; PX 105, R. 861).

This absence of competition from out-of-town banks applies in the trust department field as well as in other aspects of commercial banking. For example, out of 649 fiduciary appointments by the Fayette County court in 1960, out-of-town banks received one; this appointment represented one half of one percent of the dollar volume of fiduciary appointments during that year (DX 74, R. 1100–1101). The former president of Security Trust testified that there was "a limited amount of trust service being rendered by banks from away from Lexington" (R. 333).

Defendants' merger application to the Comptroller used Fayette County as the service area for all Lexington banks (PX 129, R. 951). The presidents of three other Lexington banks testified at trial that their competitors were the other commercial banks in Lexington (R. 190, 260, 297).[18] The Federal Deposit Insurance Corporation and the Federal Reserve Board also used Fayette County as the geographical market, the latter noting that "since there are no concentrations of population in other counties close enough to create competition with other banks, the competitive effects of the proposed consolidation would be confined to the Lexington banks" (PX 107, R. 874; PX 109, R. 877).

All this evidence amply supports the district court's conclusion that Fayette County is the relevant geographical market within which to evaluate the anti-competitive effects of this merger.

[18] All the banks in Fayette County are located in Lexington (PX 107, R. 874).

III

THE MERGER CONSTITUTES A COMBINATION IN UNREASONABLE RESTRAINT OF TRADE IN COMMERCIAL BANKING IN FAYETTE COUNTY, IN VIOLATION OF SECTION 1 OF THE SHERMAN ACT.

A. THE MERGER'S ANTI-COMPETITIVE EFFECTS MEET THE STANDARDS PRESCRIBED BY THIS COURT'S DECISIONS RESPECTING HORIZONTAL MERGERS CHALLENGED UNDER THE SHERMAN ACT.

In a series of four cases involving railroad mergers[10] and in *United States* v. *Columbia Steel Co.*, 334 U.S. 495, this Court had occasion, prior to the 1950 amendment of Section 7 of the Clayton Act, to pass on the standards to be applied when mergers between competitors are challenged under Section 1 of the Sherman Act.

As we argued last Term in *United States* v. *Philadelphia National Bank*, No. 83, the four railroad cases stand for the proposition that a merger which, without any business necessity, eliminates all competition between two major thriving competitors in the relevant market constitutes an unreasonable restraint of trade in violation of Section 1.[11] The merger in the present case is controlled by the railroad cases and clearly violates Section 1. Moreover,

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[10] *United States* v. *Southern Pacific Co.*, 259 U.S. 214; *United States* v. *Reading Co.*, 253 U.S. 26; *United States* v. *Union Pacific R.R. Co.*, 226 U.S. 61; *Northern Securities Co.* v. *United States*, 193 U.S. 197.

[11] See Brief for the United States, *United States* v. *Philadelphia National Bank*, Oct. Term, 1962, No. 83, pp. 43–49. Portions of that argument have been incorporated into this brief for the convenience of the Court.

even if *United States* v. *Columbia Steel Co., supra,* requires the examination of other market factors, the instant merger should be held to violate Section 1 because it clearly meets the tests of illegality prescribed in the *Columbia Steel* opinion.

1. *The railroad merger cases.*—In a series of decisions rendered between 1904 and 1922, this Court applied Section 1 to invalidate horizontal mergers between competitors, when all that appeared was that two major firms in the same market had combined and thereby suppressed business competition between themselves. The starting point is *Northern Securities Co.* v. *United States,* 193 U.S. 197. A holding company had been formed to acquire controlling stock in two railroads operating parallel lines across the northwestern tier of States. The government's sole complaint was that the merging companies had, by "repressing free competition between them," combined in illegal restraint of interstate commerce (193 U.S. at 335). The Court held that the combination constituted "a menace to, and a restraint upon, that freedom of commerce which Congress intended to recognize and protect, and which the public is entitled to have protected" (193 U.S. 327). The Court's holding was made without reference to or determination of the extent to which the traffic of the railroads brought under one control was subject to the competition of other railroads, that is, the strength of the remaining competition. In fact, only a minor part of the business for which the two roads competed was free from

the competition of other carriers." Handler, *A Study of the Construction and Enforcement of the Federal Antitrust Laws*, TNEC Monograph No. 38, Senate Committee Print, 76th Cong., 3d Sess., pp. 48–49.

In *United States* v. *Union Pacific R.R. Co.*, 226 U.S. 61, the Court unanimously held that acquisition by Union Pacific of a controlling stock interest in Southern Pacific violated the Sherman Act. The lines of the two railroads were widely separated, that of the Union Pacific running from Kansas City, Missouri, via Ogden, Utah, to Portland, Oregon, and that of the Southern Pacific from New Orleans via El Paso to Los Angeles and then up the coast to San Francisco and Portland (226 U.S. at p. 80). The Court recognized that the business for which the two railroads were in competition was "a comparatively small part" of their total traffic, but the Court found violation of the Sherman Act because traffic for which they did compete with each other amounted to "many millions of dollars," and because the acquisition could be expected to eliminate competition as to this traffic (226 U.S. pp. 88–89). As in the *Northern Securities* case, the combination was declared unlawful because of the elimination of the merging companies' *inter*

[18] The *Northern Securities* decision antedated *Standard Oil Co.* v. *United States*, 221 U.S. 1, in which the "rule of reason" was first announced and, in fact, the "rule of reason" was expressly rejected in *Northern Securities*. 193 U.S. at 331. However, *Northern Securities* continued to be cited and applied even after the *Standard Oil* decision, a fact which discloses that its result did not hinge on the rejection of the "rule of reason."

sese competition without reference to the strength or weakness of the remaining competition.

In *United States* v. *Reading Co.*, 253 U.S. 26, the Court vigorously reaffirmed the principles of the *Union Pacific* and *Northern Securities* cases. It held that the fact that the combination in issue brought under unified control "two great competing coal companies" and "two great competing interstate carriers" was enough "to bring it, without more, within the Anti-Trust Act" (253 U.S. at 59). The shipments of anthracite coal falling into common hands by the combination amounted, the Court noted, to over one-third of the total for the country. See also *United States* v. *Lehigh Valley Railroad Co.*, 254 U.S. 255.

The *Reading, Union Pacific* and *Northern Securities* decisions were reaffirmed in *United States* v. *Southern Pacific Co.*, 259 U.S. 214, where the Court held that the acquisition by the Southern Pacific of stock of the Central Pacific, which formed a connecting link for transcontinental shipments by a competitor of the Southern Pacific, violated the Sherman Act because the control could be utilized to divert transcontinental traffic to the Southern Pacific's line.

There is no reason to read the foregoing decisions as if they barred every merger between competing companies, and then to condemn them as impossibly restrictive, or to confine them to railroad mergers. Each of the cases must, of course, be read in the light of the facts concerning the merging companies which were obvious to the Court, even if not mentioned in the opinion. The merging companies, in each case,

were major competitive factors in the relevant market, and they were strong companies in no danger of failure absent merger.[19] The cases therefore stand for the proposition that, where merging companies are major competitive factors in a relevant market, the elimination of competition between them, by merger, itself constitutes a violation of the Sherman Act.

The standard of the railroad decisions was plainly met on the present record. First National and Security Trust were both major going concerns—the former held approximately 40 percent of the commercial banking business in Fayette County, and the latter's share was approximately 13 percent (p. 10, *supra*). Each was competing effectively in the geographical market for every aspect of the commercial banking business. The appellees' claim that the merger was needed to draw deposits of small banks in outlying areas—thus generating more loanable funds for the expanding industrial community of Lexington—is belied by the record. Not only is it improbable that a substantial amount of such correspondent business could be drawn to Lexington (PX 109, R. 881), but it also appears that First National could have achieved the same results by a variety of other means.[20] In short, the merger

[19] Cf. *International Shoe Co.* v. *Federal Trade Commission*, 280 U.S. 291.

[20] These means include: (1) capitalization of its disproportionate undivided profits (PX 93, R. 847; R. 269–270, 386–387, 634); (2) sale of stock (R. 269–270, 387, 417, 633–634); and (3) the establishment of an overnight transit service for clearance of checks, which would have required one additional part-time employee (R. 517–518, 551–552).

amounted to a "deliberate, calculated purchase of control," *United States* v. *Reading Co.*, 253 U.S. 26, 57, such as comes squarely within the prohibition of Section 1.

There is, moreover, similarity in a fundamental and crucial sense between the restraints of trade held illegal in this Court's railroad merger decisions and the restraints which would result from merger of the defendant banks. Transportation and banking, each in its own way, performs a function vital to all trade and commerce, and both might properly be called nerve centers for the country's trade and industry. Transportation is indispensable to trade and commerce of every variety. Similarly, commercial banks are today an indispensable source of the money and credit vital to every form of trade and industry. The Senate and House Committee reports on the bill which became the Bank Merger Act quoted the following from an article on banking by a well-known law professor: "Operations in deposit banking not only affect the commercial field, but also determine in great measure the supply of credit, the volume of money, the value of the dollar, and even, perhaps, the stability of the currency system."[21] In this field, as in the field of transportation, the protection of competition is the defense of all commerce, and not merely a segment, from the harms which led to the passage of the antitrust acts; the ultimate adverse effects of the concentration of

[21] Berle, *Banking Under the Anti-Trust Laws*, 49 Col. L. Rev. 589, 592 (quoted in S. Rep. 196, 86th Cong., 1st Sess., p. 18; H. Rep. 1416, 86th Cong., 2d Sess., p. 9).

banking power, through merger, are likely to extend to other industries.

2. *The Columbia Steel decision.*—In *United States* v. *Columbia Steel Co.*, 334 U.S. 495, this Court again considered the application of Section 1 to horizontal mergers. In that case the government attacked as a violation of the Sherman Act the acquisition of the physical assets of Consolidated Steel Corporation ("Consolidated") by United States Steel Corporation ("U.S. Steel"). At the time of the acquisition, U.S. Steel and Consolidated both made fabricated structural steel products, the former selling these products on a nation-wide basis and the latter selling them in 11 states (referred to as the Consolidated market). The government charged, among other things, that the acquisition would illegally restrain trade in that it would eliminate competition between U.S. Steel and Consolidated in the sale of these products.

In answer to the government's contention that the railroad merger cases established the illegality of the asset acquisition in *Columbia Steel*, the Court distinguished those—as well as cases deemed controlling by the appellees there—on the ground that they concerned factual situations which were "so dissimilar" as to offer "little guidance" in determining whether, in the case before the Court, "the competition which will be eliminated * * * is sufficient to warrant injunctive relief requested by the government." 334 U.S. at 531. This distinction was made after the Court had observed that because of increased wartime freight rates, U.S. Steel's fabricating subsidiaries, which were located in the East, were really unable to compete effec-

tively in the Consolidated market, which consisted primarily of Western States. 334 U.S. at 529–530. Hence, it is likely that the Court's holding in this regard and its refusal to follow the railroad cases were based in large part on its conclusion that U.S. Steel was, in fact, not an effective competitor in the Consolidated market.

Even if the *Columbia Steel* decision is read as casting doubt on the earlier railroad cases, however, the various criteria announced in *Columbia Steel* for testing the legality of horizontal mergers under Section 1 are met in the present case. Before proceeding to analyze the effects on competition caused by the horizontal integration in the U.S. Steel-Consolidated merger, the Court outlined the factors which enter into a determination whether a horizontal merger constitutes "unreasonable restraint" (334 U.S. at 527–528):

> * * * In determining what constitutes unreasonable restraint, we do not think the dollar volume is in itself of compelling significance; we look rather to the percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirements or purpose to monopolize, the probable development of the industry, consumer demands, and other characteristics of the market. We do not undertake to prescribe any set of percentage figures by which to measure the reasonableness of a corporation's enlargement of its activities by the purchase of the assets of a competitor. The relative effect of percentage command of a market varies with the setting in which that factor is placed.

An analysis of the record in this case in terms of each of these factors discloses that the instant merger violates Section 1, entirely apart from the railroad merger cases:

(a) *Dollar Volume.* The dollar volume involved in the present merger is substantial. As of December 31, 1960, First National had total assets of over $65 million, total deposits of over $58 million, total loans of over $35 million and total trust assets of over $31 million. Security Trust had total assets of over $21 million, total deposits of over $17 million, total loans of $12 million and total trust assets of over $35 million (PX 5–7, 35, R. 728–729, 786). See *infra*, p. 48.

(b) *Percentage of Business Controlled.* As a result of the merger the consolidated bank has 53 percent of the assets, 58 percent of the capital funds, 52 percent of the deposits and 54 percent of the loans of all Fayette County banks (PX 5–7, 11, R. 728–729, 732). In terms of functions unique to commercial banks, the merged bank has 53 percent of the area's demand deposits, 46 percent of its commercial and industrial loans, 71 percent of its single payment loans to individuals, over 88 percent of its FHA Title I (home modernization) loans, almost 80 percent of the trust business in terms of numbers of accounts and over 90 percent of that business in terms of either dollar value of trust assets held or trust department earnings (PX 35, 54, 56, 59, 64, R. 786, 801, 802, 803, 806).

(c) *Strength of Remaining Competition.* Assets of the four remaining commercial banks in Fayette County represented 17, 13, 9, and 8 percent, respectively, of the community's total bank assets after the

merger (PX 5, R. 728). The merged bank is over three times as large as the next largest bank, and over six times as large as the smallest bank (*ibid.*). Prior to the merger Security Trust and First National were approximate equals in terms of trust business (PX 35, R. 786). As a result of the consolidation, First Security has approximately 28 times as much trust business (measured in terms of dollar value of trust assets) as the next largest trust institution (*ibid.*) The presidents of three of the four remaining banks testified to extreme apprehension over the ability of their banks to remain competitive with First Security,[=] and they indicated that the remaining banks in Lexington would seriously have to consider attempting by merger to create a bank which would be somewhere near the size of First Security (R. 203, 269, 303–304).

(d) *Business Necessity or Predatory Purpose.* The court found that the banks were under no business necessity to merge but also found that they had no "predatory" purpose in merging (R. 1247, 1249). While the existence of a predatory purpose would doubtless invalidate a merger, we doubt that the Court in *Columbia Steel* intended to imply that the absence of such a purpose would be counted in its favor.

(e) *Probable Development of Industry.* The record shows an unmistakable trend toward increased con-

[=] They testified, among other things, to the increased budgets for advertising, personnel and specialized services that would result from the concentration of assets in the merged bank (R. 197, 292, 302), and to the new deposits it could attract by virtue of the fact that disparity in size is a significant factor in the competition for new accounts (R. 199–203).

centration in commercial banking in Fayette County, despite the economic and population growth of the county. In 1929 there were 10 banks in Fayette County; in 1938 there were seven; as a result of this consolidation, there are five (DX 38, R. 1058). At least one past consolidation is directly attributable to a necessity to compete with First National, then the preeminent commercial bank in Fayette County (R. 203). No new bank has been established in Fayette County since 1938 (DX 38, R. 1058). As we have noted, the presidents of three of the four remaining banks in Lexington stated that they would have to give serious consideration to mergers in order to remain competitive with First Security. Thus, there is every indication that the present number of banks will be further reduced if this consolidation is permitted to stand, and there is not the slightest indication of entry of new competition to replace what would be eliminated by it.

(f) *Consumer Demands.* The report of the Federal Deposit Insurance Corporation to the Comptroller stated that there is a "strong demand for credit in the Lexington area * * *." (PX 109, R. 880). The court found it to be "undisputed that in recent years Lexington has grown and expanded industrially to a remarkable extent" (R. 1249). The elimination of a strong, independent competitor thus comes about at the very time when the demand for banking services in Fayette County is large and increasing.

(g) *Other Factors.* The presidents of the competing banks testified that newspaper advertising and

favorable publicity were important factors in bank competition in Fayette County (R. 266–267, 301). As a result of the merger, First Security, through its trust department, controls the only daily newspapers published in Fayette County (R. 197, 266–267, 301; PX 126, R. 918–919). The record also shows that the customers for commercial bank services constitute a primary source for new trust business (R. 329, 378–379), and that management of trust properties provides important competitive advantages in securing the banking business of the tenants of such properties (R. 255, 258, 266, 365, 377–378, 591–592). As a result of the merger, First Security has by far the largest share of the community's banking business, and also, through its trust department, control over substantial portions of the downtown business area and of the nearby farm acreage (PX 62, 129 (Exhibit H), R. 805, 970).

Thus, whether judged by this Court's controlling decisions in the railroad cases or by the precise standards laid down in the *Columbia Steel* case—none of which was even adverted to in the district court's opinion—the present merger creates an unreasonable restraint of trade in violation of Section 1 of the Sherman Act.

B. THE MERGER WOULD CLEARLY VIOLATE SECTION 7 OF THE CLAYTON ACT, AND THIS CIRCUMSTANCE SHOULD BE GIVEN SUBSTANTIAL WEIGHT IN DECIDING WHETHER IT ALSO VIOLATES SECTION 1 OF THE SHERMAN ACT.

In *United States* v. *Philadelphia National Bank*, 374 U.S. 321, decided last Term, this Court held that a consolidation of two banks, similar in form to the consolidation effected in the present case, came within

the ambit of Section 7 of the Clayton Act, as amended in 1950. The Court then went on to hold that the particular merger in that case, which resulted in the merged bank's control of more than 30 percent of the relevant market, was a "clear" violation of Section 7. 374 U.S. at 364. In the present case the complaint did not allege any violation of the Clayton Act. A comparison between the anti-competitive effects of the present merger and the merger which gave rise to the *Philadelphia National Bank* case discloses, however, that the anti-competitive consequences of the present merger substantially exceed those of the consolidation in *Philadelphia National Bank* (pp. 47–53, *infra*).

1. *The relation between Section 1 of the Sherman Act and Section 7 of the Clayton Act.*—As this Court observed in *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 328–329, "[T]he legislative history of Section 7 indicates clearly that the tests for measuring the legality of any particular economic arrangement under the Clayton Act are to be less stringent than those used in applying the Sherman Act." Cf. *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 610. This conclusion was based on the expressed intentions of the Congress which passed the original version of Section 7 and the Congress which substantially amended the provision in 1950. Both were patently motivated by a desire "to reach incipient monopolies and trade restraints outside the scope of the Sherman Act * * *." *Brown Shoe, supra*, 370 U.S. at 318, n. 32, and authorities there cited.

But the obvious fact that "not every violation of § 7, as amended, would necessarily be a violation of

the Sherman Act" (*United States* v. *Philadelphia National Bank*, 374 U.S. 321, 355) does not mean that Section 7 is entirely irrelevant in a Sherman Act case. Indeed, as this Court observed in the same passage just quoted, "[T]he tests of illegality under the Sherman and Clayton Acts are complementary." *Ibid.* We submit that if a merger which is challenged under Section 1 of the Sherman Act plainly violates the standards of illegality under Section 7 of the Clayton Act, as amended, this factor is of great significance in determining whether it also violates the Sherman Act's prohibition against unreasonable restraints of trade.

We reach this conclusion for the following reasons:

First, we begin with the proposition that the Sherman Act. "[a]s a charter of freedom * * * has a generality and adaptability comparable to that found to be desirable in constitutional provisions." *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344, 359–360. The language of Section 1 is "all-encompassing," *Northern Pacific R. Co.* v. *United States*, 356 U.S. 1, 5, and its judicial construction, which modifies its application by the "rule of reason," does no more than "[impart] to it the gloss of history." *Federal Trade Commission* v. *Motion Picture Advertising Co.*, 344 U.S. 392, 405 (dissenting opinion).

Second, Section 7 of the Clayton Act, as first enacted and as amended in 1950, constitutes an expression of public policy which is highly relevant in determining whether a "combination" or "contract" which permanently consolidates two competitors amounts to an

unreasonable restraint of trade within the meaning of Section 1 of the Sherman Act. In *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 507 n. 7, this Court expressly recognized the materiality of Section 7 to a Sherman Act case. The Court there said:

> • • • It must be assumed, however, that the public policy announced by § 7 of the Clayton Act is to be taken into consideration in determining whether acquisition of assets of Consolidated by United States Steel with the same economic results as the purchase of the stock violates the prohibitions of the Sherman Act against unreasonable restraints.

And in *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 609–610, while noting that the criteria for illegality under the Sherman Act are "more stringent" than those under Section 3 of the Clayton Act, this Court declared that "the Clayton Act's more specific standards illuminate the public policy which the Sherman Act was designed to subserve."

Third, the expression of public policy incorporated in Section 7 of the Clayton Act is a significant element in distinguishing, for Sherman Act purposes, between restraints of trade which are reasonable and those which are unreasonable. In applying the Sherman Act, this Court has often spoken of it in terms of an expression of national "policy." In *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1, 4, the Act was termed "a comprehensive charter of economic liberty," and the Court commented that "the policy unequivocally laid down by the Act is

competition." Similarly, in *United States* v. *Columbia Steel Co.*, 354 U.S. 495, 534, the ultimate question to a majority of the Court was whether "* * * the proposed contract *violates our public policy* as stated in the Sherman Act." (Emphasis added.) This "policy" is obviously not a static concept fixed in the minds of Congress in 1890; to the same extent that the "rule of reason" imparts the "gloss of history" it also bestows upon the Act the flexibility to adapt to modern means and unforeseen situations, and to cope with current national economic problems. As this Court observed in *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 397, "Reasonableness is not a concept of definite and unchanging content." And when a later expression of public policy, such as that set out in Section 7 of the Clayton Act and its 1950 amendment, is promulgated by Congress, it necessarily becomes a particularization of the general principle of reasonableness established by the Sherman Act."

The situation presented in this case is, in this regard, similar to that in *United States* v. *Hutcheson*, 312 U.S. 219, where Section 1 of the Sherman Act

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[29] The standard of reasonableness is in this respect, similar to that which governs negligence concepts in tort law. If, for example, a state legislature enacted a statute requiring factory machinery to be "reasonably guarded," and it thereafter enacted another law specifying a particular type of guard which it required to have installed on certain machinery, the second statute, even absent any express reference therein to the first, would establish a standard of conduct which would govern any determination of negligence. See Amer. Law Inst., Restatement of Torts, § 285, and compare illustrations 3, 4 and 5.

was accommodated to the subsequently announced national policy of the Norris-LaGuardia Act. The Court there approved the following statement made by Mr. Justice Holmes, on circuit: "The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed." *Johnson* v. *United States*, 163 Fed. 30, 32, quoted at 312 U.S. 235. By enacting a statute which prohibits mergers which may have the effect of substantially lessening competition "in any line of commerce in any section of the country," Congress has adopted a policy which should ordinarily render such mergers unreasonable restraints of trade.

Fourth, in other situations involving the overlapping of the Clayton and Sherman Acts, this Court has applied the Sherman Act to prohibit conduct which is more pointedly the subject of Clayton Act proscriptions. In *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1, for example, tying agreements which could not be reached under the limited enumeration of "commodities" in Section 3 of the Clayton Act were held to violate Section 1 of the Sherman Act, albeit the vendor did not possess the "monopoly power" or "dominance" over the tying product which had previously been thought necessary for a Sherman Act violation. 356 U.S. 1, 10, 11. Compare *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 608–611.

Similarly, in *Federal Trade Commission* v. *Motion Picture Advertising Co.*, 344 U.S. 392, this Court held

certain exclusive dealing contracts to be violations of the Sherman Act (and thereby of Section 5 of the Federal Trade Commission Act) although the more specific statutory provision governing such contracts—Section 3 of the Clayton Act—was held to be inapplicable because of the nature of the contracts. 344 U.S. at 397. Notwithstanding the fact that the quantity of business affected in the *Motion Picture Advertising* case was substantially less than that in *Standard Oil Co.* v. *United States*, 337 U.S. 293, which was then the leading decision relating to exclusive dealing, 344 U.S. at 401–403 (dissenting opinion), the Court apparently absorbed the policy of Section 3 into both the Sherman Act and the Federal Trade Commission Act.

Fifth, the basic similarly of the inquiry necessary to determine whether one of the more specific provisions of the Clayton Act or the general provisions of the Sherman Act have been violated has produced a body of law in which Clayton Act decisions and Sherman Act decisions are relied on interchangeably as precedents for steps in the analysis. With respect to mergers, for example, this Court in *Brown Shoe Co.* v. *United States*, 370 U.S. 294, cited a Clayton Act Section 3 case in explaining the "primary vice" of vertical integration (370 U.S. at 324), and a Sherman Act case to illustrate the relevance of cross-elasticity of production facilities to an investigation of the vertical aspects of a merger challenged under Section 7 of the Clayton Act, as amended (370 U.S. at 325, n. 42). And the Court's ultimate decision regard-

ing the probable effect of the vertical aspects of the merger leaned heavily on an analysis of cases involving tying agreements and requirements contracts challenged under Section 3 of the Clayton Act (370 U.S. at 329–331). This illustration merely highlights the necessary interdependence of the Sherman and Clayton Acts resulting from the basic antitrust policy and purpose common to both statutes. In the present case, the determination of the relevant geographic and product markets is governed by the same principles as would govern this case if it had been brought under Section 7 of the Clayton Act. The remaining question—whether the merger effects an unreasonable restraint of trade—may differ from the parallel inquiry in a Section 7 case not in kind, but in degree. For if the effect of a merger between competitors "may be substantially to lessen competition," it can hardly be denied "that competition in this field between the parties to this contract is so substantial that its elimination under these circumstances constitutes an unreasonable restraint" in violation of the Sherman Act, *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 531.

In summary, while we agree that the Sherman Act, as construed in *Columbia Steel*, establishes more

rigorous standards of proof regarding the effect of a merger on competition than does the present Clayton Act, we submit that the 1950 amendment of Section 7 of the Clayton Act should be given great weight in appraising the legality of a merger between competitors under the Sherman Act.

2. *The anti-competitive consequences of this merger compared with those in Philadelphia National Bank.*—An analysis of the effects of this merger side-by-side with the merger invalidated last Term in *Philadelphia National Bank* discloses that the present merger presents a far more serious threat to effective competition in the Fayette County market than did the *Philadelphia Bank* merger in its four-county relevant market.

The merger of the two Lexington banks took place in a smaller market than that in the *Philadelphia National Bank* case, but this market is one in which the merged bank would be more dominant and more of a threat to its competitors. At the same time, Lexington is a more isolated market, and one in which the alternative choices available to borrowers are even more restricted than in Philadelphia.

While the merged banks are considerably smaller in the present case than they were in the *Philadelphia*

National Bank case, they are nevertheless of impressive size when viewed in light of the size of the community. Thus, the First National Bank of Lexington had assets of $65 million, deposits of $58 million, and loans of $35 million; whereas Security Trust had assets of $21 million, deposits of $17 million, loans of $12 million. These figures are, of course, substantially smaller than those of the merging banks in Philadelphia;[24] however, all the Philadelphia commercial banks held more than $5 billion in assets as compared to the $163 million held by all the Lexington banks. Thus the differences in size between the banks reflects the difference between the four-county Philadelphia area, with a population of 3⅓ million, and the population of Fayette County, which is 131,900. For while the assets of the combining banks in Philadelphia were 20 times as large as those in the present case, the four-county Philadelphia population was 25 times as large, and its total bank assets were 30 times as large.

In addition, the Lexington banking community was more highly concentrated before the merger than was

[24] Philadelphia National Bank had assets of a billion dollars, deposits of $946 million, and loans of $524 million, and Girard Trust Corn Exchange Bank had assets of $740 million, deposits of $650 million, and loans of $399 million.

that in Philadelphia. With only six banks, First National had a lead position of impressive proportions even before the merger, whereas Philadelphia National Bank was the second largest of the 42 commercial banks in the Philadelphia market. The Philadelphia case involved a merger of the second and the third largest banks in the area, and the combined bank would have had 36 percent of the area banks' total assets, 36 percent of deposits and 34 percent of net loans; here, in contrast, First National before the merger had approximately 40 percent of the area banks' total assets, deposits and loans. In the *Philadelphia* case the Court noted that before the merger the two largest banks controlled approximately 44 percent of the area's commercial banking business, and after the merger the two largest banks would control 59 percent—an increase of more than 33 percent in concentration. In the present case, the single largest bank will increase its percentage of the market from about 40 percent to almost 53 percent, resulting in an increase in concentration in this *single* firm of almost 33 percent.

The Court "shaded" the merged bank's share of the relevant market in the *Philadelphia National Bank* case to about 30 percent in view of the active

competition from outside banks, and it then specifically noted that the 30 percent figure was not to be taken as an indication of the smallest market share threatening undue concentration (*United States* v. *Philadelphia National Bank*, 374 U.S. at 364, n. 40). In the present case, by way of contrast, the merged banks control almost 53 percent of all local commercial banking assets, deposits and loans and are about three times the size of the next largest bank. Moreover, the amount of competition from outside commercial banks is negligible in Lexington (pp. 25–27, *supra*), whereas it was claimed to be substantial in Philadelphia.

Just as in *Philadelphia National Bank*, the merging banks here were keen competitors for both commercial banking and trust department business (PX 107, R. 874–875; PX 109, R. 882; GX 129, Exhibit (G), R. 970; R. 1248–1249). This was reflected in rates and charges (PX 129, Exhibit (G), R. 969–970), the offering of competitive services (R. 433), and the competitive solicitation of business (R. 358). But for the merger, First National and Security Trust undoubtedly would have become even more formidable competitors by reason of the additional branch offices which each was planning to build. First National had applied for permission to build a branch office about a quarter of a mile from a Security Trust branch (GX 38–52, R. 788–800), and Security Trust had applications pending for two new branch offices, each about a mile from a First National branch (GX 129, R. 952; GX 107, R. 871–872).

In the trust department field, the results of the merger were even more emphatically anticompetitive. Security Trust was the leading bank, holding over $35 million in trust assets, and First National was second, with $31 million in such assets (PX 35, R. 786). Together, the merging banks accounted for 94.82 percent of all trust assets, 79.62 percent of all trust accounts, and 92.20 percent of the total earnings of all trust departments in the county (*ibid.*).

It is also noteworthy that the presidents of three of the remaining banks[25] testified that they viewed the merger with apprehension. They explained that bigness is a substantial advantage in banking, that First Security's size would threaten all of the other banks, and that other mergers might be necessary as defensive measures. These were, of course, rough judgments. The district court concluded that they were "based merely upon surmise and [were] lacking in factual support" (R. 1249). We view them as telling evidence of the substantial impact which this merger would have on this medium-sized community.

It is readily apparent that the defenses here were the same as those in *Philadelphia National Bank*, and that they similarly constituted no adequate justification for the merger. The defense sought to establish that banking competition is different from other commercial and industrial competition, and that the law should recognize different standards to judge competition and concentration in commercial banking. In *Philadelphia National Bank*, 374 U.S. 321, 368–369,

[25] See n. 8, *supra* at p. 11.

372, the Court was most emphatic in rejecting that contention; it did so in terms of "fundamental national economic policy," not on a basis which would permit of a distinction between a Clayton Act case and a Sherman Act case. *Philadelphia National Bank* similarly disposes of the defense that concentration in the Lexington market would be offset by the enhanced competition for the correspondent bank deposits of the outlying Kentucky areas (374 U.S. at 370), and of the defense that banking growth in Lexington had been lagging behind the community's industrial, commercial and institutional growth, and that a bigger bank would attract more industry to the community (374 U.S. at 371).

The appellees also argued that the history of First National demonstrates that control of over 53 percent of the relevant market does not doom competition. This contention was based on the fact that First National had, in 1942, held 53.7 percent of the total deposits in the area, and that this share had fallen to 40 percent by 1960. But the record fails to show why this decline occurred, and there is no reason to believe that it will be repeated. In fact, there is good reason to assume otherwise, for Security Trust has brought to the merged bank the trust portfolio, staff and expertise which undeniably played a large part in its past growth as a commercial bank. For the first time virtually all of the trust business has been brought under the control of the dominant bank, and there is no reason to suppose that its position will again decline. Moreover, to speculate about the

possibility of such a decline rejects a basic premise of the antitrust laws, which is that market forces cannot be relied upon to undo satisfactorily the concentration resulting from unlawful mergers.

Finally, the defense urges that a "major difference" between this case and *Philadelphia National Bank* is that the two banks in that case had never merged. (Appellees' Motion to Affirm, p. 30.) The banks in this case have operated in consolidated form from March 1, 1961 to February 27, 1962 when the trial was concluded. No significant evidence appears from the operating results for the year during which this suit was pending in court. The defendants themselves have urged that the pendency of the action has prevented them from deriving the anticipated benefits of the merger (*id.* at 31; see R. 602). And the presidents of competing banks who testified for the government apparently saw nothing during that year to quiet their fears (R. 199, 268–269, 301–303).

IV

THE MERGER CONSTITUTES A COMBINATION TO MONOPOLIZE CORPORATE TRUST SERVICES IN FAYETTE COUNTY, IN VIOLATION OF SECTION 2 OF THE SHERMAN ACT

1. For reasons stated previously (pp. 22–25, *supra*), the services provided by corporate fiduciaries in the Fayette County area constitute an appropriate submarket for measuring the anti-competitive effects of this merger. As a result of the consolidation, the merged bank's trust department retains approxi-

mately 80 percent of the market's total number of trust accounts of this sort, thereby holding approximately 95 percent of all the assets kept in such accounts (PX 35, R. 786). This overwhelming share of the market is further reflected in an analysis of the merged bank's 1960 share of the earnings of corporate fiduciaries in Fayette County, which discloses that the appellees' earnings constituted more than 92 percent of the total (*ibid.*). These percentages are certainly sufficient, if the relevant market has been appropriately drawn, to show that the merged bank is monopolizing the corporate trust business in Fayette County. Just as Judge Learned Hand assumed as a matter of course in *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 429 (C.A. 2), that "to have combined ninety per cent of the producers of ingot would have been to 'monopolize' the ingot market" (endorsed by this Court in *American Tobacco Co.* v. *United States*, 328 U.S. 781, 813–814), it appears obvious that to combine more than ninety percent of the assets held by corporate fiduciaries is to "monopolize" the corporate trust administration market. And the fact that the market which has been so monopolized is a relatively small one is of no significance. Section 2 prohibits monopolization of "any part" of interstate commerce, and "it is enough if some appreciable part of interstate commerce is the subject of a monopoly, a restraint or a conspiracy." *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 225; compare *United States* v. *Griffith*, 334 U.S. 100.

2. If it were necessary to the decision of this case,

we would be prepared to argue that the merger also constitutes an illegal combination to monopolize commercial banking in Fayette County. The merged bank (1) has 53 percent of the county's demand deposits, 46 percent of its commercial and industrial loans, 71 percent of its single-payment loans, and more than 88 percent of its FHA Title loans; (2) has almost total control of trust services (more than 95 percent of the trust assets held by corporate fiduciaries in the county), which gives it a tremendous advantage in obtaining commercial banking business; and (3) is more than three times as large as the next largest bank in the county, and has even greater supremacy over its other competitors. We would urge that this tremendous strength and supremacy in this market constitutes monopoly power in any meaningful sense of the term. See *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 226, n. 59; *American Tobacco Co.* v. *United States*, 328 U.S. 781, 813–814; *United States* v. *Griffith*, 334 U.S. 100, 107; *United States* v. *Paramount Pictures*, 334 U.S. 131, 173; *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 429 (C.A. 2). Since we think it clear, however, that this merger violates Section 1 of the Sherman Act, and since an adverse decision against us on that issue would necessarily lead to rejection of our Section 2 argument, there is no need for the Court to pass upon the more difficult Section 2 question, no matter how it decides the Section 1 issue.

CONCLUSION

The judgment of the district court should be reversed, and the cause should be remanded with directions that the court enter a judgment of divesture.

Respectfully submitted.

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JANUARY 1964.

APPENDIX

The government's exhibits PX 1 through PX 130 were admitted into evidence pursuant to a stipulation between the parties (PX 1, R. 717–727) by which PX 106 through PX 130 remained subject to the possibility of objections based upon competency, materiality and relevancy. R. 182–184; see R. 707. Defendants did object to PX 107 and PX 109 but were overruled at R. 464 and R. 462, respectively. A revised version of PX 62 was admitted at R. 482 PX 131 was admitted at R. 646 (see also R. 706). The government's Requests for Admissions of Fact and defendants' responses thereto were admitted at R. 181.

The defendants' exhibits DX 8 through DX 90 were admitted into evidence pursuant to a similar stipulation between the parties (DX 8, R. 1018–1024). R. 325; see R. 707. Certain exhibits were revised and renumbered and admitted at R. 481. Defendants' other exhibits were admitted as follows:

Defendants' Exhibit	Record
DX 1	237
2	252
3	315
4	316
5	317
6	317
7	318
91	407
92	411
93	459
94	481
95	482
96	597
97	668

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